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Decision 02-08-075 August 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into the Status, Rates, Rules, Operations, Service, Facilities, Contracts, and Practices of the Union Pacific Railroad Company in the Supply, Distribution, and Sale of Water by the Keene Water System to the Communities of Keene and Woodford in Kern County.	Investigation 00-05-020 (Filed May 18, 2000)

ORDER DENYING REHEARING OF DECISION (D.) 02-04-017

I. SUMMARY

This decision denies the application of the Union Pacific Railroad Company (Union Pacific) for the rehearing of D.02-04-017 (hereinafter, the Decision), which found the Keene Water System, operated by Union Pacific, to be dedicated to public use and is a public utility under Public Utilities (PU) Code §2701.

II. FACTS/PROCEDURAL BACKGROUND

Union Pacific and its predecessors, including the Southern Pacific Transportation Company (SP), have provided water to the communities of Keene and Woodford in Kern County for more than 80 years. This system is the only remaining segment of SP's former water supply line that ran from Tehachapi to Caliente. In 1952, Kern County contracted with SP for additional water as an accommodation when SP enjoyed a surplus. In 1962, SP served the county notice that, as its water source was no longer producing water, it was no longer obligated to provide the surplus water. On June 30, 1967, SP gave Kern County notice that it would terminate the 1952 agreement on or before September 1, 1967.

On August 16, 1967, Kern County filed a complaint, Case (C.) 8673, with the Commission asking that SP be declared a public utility because it had been selling and delivering water for years to the Stonybrook Retreat, a fire station, schools and individuals. SP denied the complaint, arguing that it operated a private water system as an accommodation only and that it sold surplus water when it was available. On its own motion, the Commission opened an investigation (C.8674), consolidating both cases. Matters were put on hold, pending negotiations between SP and the new water district, the Keene Water District.

On February 13, 1969, SP and Keene reached an agreement whereby SP would continue to provide service until Keene took over the pipeline. Without opposition, on June 10, 1969, the Commission dismissed both cases in D.75769 (69 CPUC 557). In 1972, the Keene Water System was deemed a public water system subject to the state's drinking water regulatory program. The Environmental Health Services Department (DHS) administered the state's Safe Drinking Water programs for Kern County water systems with fewer than 200 connections, such as Keene. On July 1, 1993, DHS assumed those responsibilities and began direct regulatory oversight of the safety of the Keene Water System's supply.

Another round of litigation began in July 1982 when SP filed a complaint (C.179754) against the Farm Workers in Kern County Superior Court. SP had been providing water to the Farm Workers from 1970 to 1981 without charge. In 1981, SP notified the Farm Workers that it would no longer supply them water free of charge, but would allow them a reasonable time to find an alternate water supply or to enter into agreement with SP for the sale of surplus water. The Farm Workers refused to sign the surplus agreement, and a lawsuit ensued. The Farm Workers filed an action in Kern County Superior Court (C.185690), claiming damage to a bridge, roads, trees, and shrubbery resulting from SP weed control spraying and wrongful diversion of water. On August 20, 1986, the Kern County Superior Court approved the settlement of both cases, which allowed the Farm Workers to continue diverting water free of charge until December 31, 1985. Thereafter, SP and the Farm Workers were to execute a surplus

water agreement for the delivery of water only up to December 31, 1986. Thus concluded C.179754 on August 21, 1986.

The Farm Workers drilled and operated their own well in 1987 and 1988, until it failed, whereupon they sought an emergency supply from SP. On August 8, 1988, the parties signed an agreement for SP to sell surplus water as an accommodation for a 30-day period. The accommodation period was extended until December 31, 1988. In May 1989, SP discovered that the Farm Workers continued taking water from SP's pipeline. SP notified the Farm Workers that service would be disconnected on June 28, 1989 after the Farm Workers failed to contact SP, as requested.

After SP notified the Stonybrook Corporation (aka National Farm Workers) that its water service would be terminated, it filed a complaint (Case No. 89-06-051) at the Commission in 1989. The Farm Workers sought a temporary restraining order and a Commission investigation into D.76769. The Commission required SP to continue supplying water to Stonybrook during the pendency of the complaint. After more than six years passed without activity, the Commission dismissed the complaint in D.97-09-014 (74 CPUC.2d 651), without prejudice, for lack of prosecution.

On May 18, 2000, the Commission issued an order instituting investigation (OII) to determine whether the Keene Water System, currently operated by Union Pacific, is a public utility water system, as defined by PU Code §2701. The Commission held two days of evidentiary hearings on February 13-14, 2001. In addition, two public participation hearings were held on August 4, 2000, and on January 29, 2001. The parties filed opening briefs on March 12, 2001, and reply briefs on March 19, 2001.

Decision (D.) 02-04-017 was issued on April 8, 2002. The Decision found that the Keene Water System has been dedicated to public use, and that Union Pacific is operating a public utility water system in the communities of Keene and Woodford in Kern County.

On May 8, 2002, Union Pacific filed an application for the rehearing of D.02-04-017 on the following grounds: 1) the finding of an implied dedication of the water system is not supported by the evidence; 2) the Decision arbitrarily and

unconstitutionally fails to establish appropriate water rates reflective of the cost of providing service and capital expenditures; 3) the Decision must either establish an adequate rate or permit Union Pacific to abandon the water system; 4) the Decision erroneously requires Union Pacific to provide water service to the Stonybrook Corporation and Steve and Barbara Cummings; and 5) certain findings are not supported by the evidence.

III. DISCUSSION

A. The Law and the Evidence Support the Finding of an Implied Dedication of the Keene Water System As a Public Utility.

Union Pacific challenges the Decision on the ground that its finding of an implied dedication of the Keene Water System as a public utility is legal error because the Commission failed to meet the legal standards required. We do not agree. The Decision not only meets the legal requirements, including the test used by Union Pacific, but also complies with the dedication doctrine. The dedication doctrine holds that the dedication of any entity to public use is a factual question, and whether dedication has occurred may be express or implied.[1] This discussion affirms that the implied dedication of the Keene Water System to public use occurred as a result of the actions of its owners, and that it is a public utility under PU Code §2701.

The Decision accurately set forth the definition of public utility according to PU Code §216.[2] It then defined what a Commission-regulated water utility is under PU Code §2701:

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[1] *S. Edwards v. RR Comm'n* (1925) 196 Cal. 62, 70.

[2] The Decision, *mimeo* at 8 described the pertinent portions of PU Code §216 as follows:

"(a) …every…water corporation…where the service is performed for, or the commodity is delivered to, the public or any portion thereof.

(b) Whenever any…water corporation…performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that…water corporation…is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions in this part."

> Any person, firm, or corporation…owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person, firm, corporation, municipality, or any other political subdivision of the State, whether under contract or otherwise, is a public utility, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter.

The Keene Water System fits squarely within the above definitions.

PU Code §2704 is recognized as an exception to PU Code §2701 in that it exempts an owner of a water supply from Commission jurisdiction if the water supply is primarily used for domestic or industrial purposes by the owner or for the irrigation of his lands. However, as noted in the Decision, Union Pacific and its predecessor cannot claim an exemption under §2704 because they have not been the primary user of the water supply for almost four decades.

The Decision points to several activities that support a finding of implied dedication, including the fact that: a) since the 1960s, water was sold for the primary use of the community and not the railroad; b) in 1994, existing plant was removed and replaced with a new well for the primary benefit of the community and not the railroad; and c) in 1996, SP applied for a non-exclusive franchise agreement to construct a pipeline on a county roadway to furnish water for railroad and community use.[3] Union Pacific argues that "the fact that since the 1960s water has been produced primarily for the use of parties other than the railroad does not manifest the required intent of 'dedication'." (Rhg. App., p. 5) It further contends that the railroad did nothing more than take steps to continue the reliable flow of water when it was required by the Commission to continue supplying water, based on the pending proceeding. These facts, asserts Union Pacific, do not imply dedication. We conclude that Union Pacific's arguments are self-defeating as defenses to the finding that the Keene Water System is a public utility.

[3] Decision, *mimeo*, p. 4.

Neither Union Pacific nor its predecessor SP manifested an express intent to dedicate the Keene Water System to public use. However, the dedication of a water system need not be express; it may be implied by the circumstances. *Yucaipa Water Co. No. 1 v. Pub. Util. Comm'n* (1960) 54 Cal.2d 823, 827; *Producers Transportation Co. v. RR Comm'n of Calif.* (1917) 176 Cal. 499. Although Union Pacific's intent, in entering into various agreements with customers, was not to create a legal obligation on its part to provide water service, its expressed intent is undermined by its conduct.

Union Pacific relies on a test set forth in *Van Hoosear v. RR Comm'n of Calif.* (1920) 184 Cal. 553:

> The test to be applied is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. [Citations omitted.][4]

In *Van Hoosear*, the sole issue was whether Petitioner's business was a public utility. Petitioner had a small water plant on his farm, which he installed to supply water for his own use. However, he began to supply surplus water to some of his neighbors as a matter of accommodation. He continued to do so for years, but sought to discontinue service after selling his farm. Petitioner requested permission from the Commission to discontinue service, but the Commission refused the request. He therefore continued providing the water service. The court held that Petitioner's water service had been dedicated to public use because Petitioner continued providing service in acquiescence to the Commission's order after voluntarily coming before the Commission with a petition to discontinue the water service. The court's rationale is as follows:

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[4] *Van Hoosear, supra*, p. 554; Union Pacific Rhg. App., p. 5.

> His petition for leave to discontinue of necessity assumed that he was in a public utility business, as otherwise the commission would have had no authority in the premises. It was in effect a representation that he was so engaged…where, after having made this representation and after having been refused leave to discontinue, he to all outward appearances acquiesces in the refusal and continues his service, it is a fair inference that he continues in the character which he represented he had and which the commission assumed he had; in other words, it is a fair inference that by continuing in business under these circumstances he held himself out, from then on at least, as doing a public utility business. So holding himself out, his business became in truth a public utility business, no matter whether it was previously so or not.

Van Hoosear, *supra* at 556. This rationale has equal application here.

The dedication doctrine provides that implied dedication may be inferred from the acts of the property owner. As did the Petitioner in *Van Hoosear*, Union Pacific and SP provided water service for years – in this case since the 1960s. Petitioner sought to terminate service after selling his farm. Union Pacific seeks to terminate service to Keene Water System's customers. Kern County Superior Court and the Commission refused to allow the termination. As a result thereof, Union Pacific acquiesced and continues to provide water service. By continuing to provide water service under these circumstances, Union Pacific is in fact holding itself out as a public utility.

The operation of the Keene Water System for community use is convincing proof that it is a public utility. Keene had already been declared a public water system in 1972, and was subject to the state's drinking water regulatory program administered by the DHS.[5] In 1994, existing plant was removed and replaced with a new well for the primary benefit of the community, and not the railroad. (Decision, *mimeo*, p. 10.) This decision is not challenging whether Union Pacific's capital expenditures for this project were necessary or reasonable; that issue will be addressed in the rate case. Here, the

[5] At this time, the water system was not subject to Commission jurisdiction.

focus is on the owners' activities, which support the Decision's finding that by its conduct, Union Pacific dedicated the Keene Water System to public use.

SP's application in 1996 for a non-exclusive franchise agreement to construct a pipeline on a county roadway to furnish water for railroad and community use provided additional evidence that Union Pacific assumed the role of a public utility. Franchises are generally granted for the purpose of providing a service or commodity for public use, as Government Code §26001 provides:

> Any general law applicable to the granting of franchises by municipal corporations and counties throughout the State for purposes involving the furnishing of any service or commodity to the public or any portion thereof shall be complied with in the granting of any franchises by the board of supervisors.

Therefore, as noted in the Decision, the granting of a franchise is tantamount to declaring that the property is for public use. When SP sought a franchise from Kern County to build a water pipeline, it made representations of community use to build the pipeline on county roads. Union Pacific's explanation that the railroad applied for the "privilege" of placing a new water pipeline along the roadway to address DHS' concerns and to comply with the Commission's order to continue supplying water does not legally rebut the inference that, having been deemed a public water system, its conduct was consistent with that of a public utility.

Taken together, the foregoing facts lead to the reasonable conclusion that the dedication to public use was implied by conduct. Even if Union Pacific's contracts with customers remain in effect, as Union Pacific asserts, they are not controlling on the issue of its public utility status, in light of Union Pacific's conduct acquiescing to the Commission's jurisdiction. Moreover, Union Pacific's request, via its rehearing application, for the Commission to grant a rate increase or to permit to it to abandon the water system, provides further evidence of Union Pacific holding the water system out as

a public utility.[6] As may be required of any public utility, Union Pacific has provided cost information for the water system to Commission staff, in accordance with the Commission's order in the OII.

B. Union Pacific May Not Use An Estoppel Argument Against the Commission in a Case Dismissed for Lack of Prosecution.

Union Pacific asserts that the Commission is estopped from asserting jurisdiction because the Commission previously held in D.97-09-014 that the Keene Water System is not a public utility system and nothing has changed since that Decision was issued. This argument is lacking in merit. The Decision has accurately set forth the elements of estoppel and presented cogent arguments against it; therefore, we will not repeat them here. However, it is worth capturing the Decision's well-stated rationale:

> Union Pacific places far too much weight on D.97-09-014. In C.89-06-051, the docket was inactive for approximately six years. [footnote omitted] The specific conduct or action the Commission took in D.97-09-014 was to order dismissal of C.89-06-051 without prejudice for lack of prosecution. We find that a Commission order dismissing a case without prejudice for lack of prosecution fails to establish conduct upon which the Commission can be estopped from exercising jurisdiction over Union Pacific concerning its operation of the Keene Water system.[7]

D.97-09-014 was not resolved on the merits, nor was D.75769, which dismissed, with the concurrence of the parties, an earlier complaint against SP (C.8673), as well as the Commission investigation (C.8674) that was consolidated with it. Because neither D.75769 nor D.97-09-014 was decided on the merits, the Commission never reached the question of the Keene Water System's public utility status. This OII constitutes the

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[6] In *Franscioni v. Soledad etc. Co.,* (1915) 170 Cal. 221, the dedication to public use was implied from the application of the property owner to the board of supervisor for a public fixation of water rates. See also *Brewer v. RR Comm'n* (1922) 190 Cal. 60, where the dedication to public use was implied from the fact that the water company had voluntarily submitted itself to the jurisdiction of the Railroad Commission and to Commission orders fixing the rates to be charged consumers for the company's water service.

[7] Decision, *mimeo*, pp. 16-17 (emphasis in original).

vehicle for the Commission to investigate the status, rates, rules, operations, service, facilities, contracts, and practices of Union Pacific to determine whether it is a public utility water system, as defined by PU Code §2701. The Commission has completed the first step by determining that the Keene Water System is a public utility. The Commission is currently investigating Union Pacific's rates and practices to ensure that they comply with applicable law.

Since D.97-09-014 was dismissed and not decided on the merits, it does not establish any precedent that is binding on the Commission. Therefore, the Commission cannot be estopped from asserting jurisdiction on the ground of D.97-09-014's holding. Moreover, Union Pacific's assertion that nothing has changed since 1997 is contradicted by its acquiescence to the OII's order not to abandon the water system (OII, Ordering Paragraph 2), to make its financial and operational records for the water system available for review by Commission staff (OII, Ordering Paragraph 4), and its plea in the rehearing application that the Commission must allow Union Pacific adequate rates or permit it to abandon the system.

C. Union Pacific Failed to Demonstrate an Unconstitutional Taking of Property Resulting from Necessary and Unavoidable Delays in Putting on the Rate Case.

Union Pacific asserts that the Commission arbitrarily and unconstitutionally failed to establish appropriate water rates and the deferral of the rate issue violates its rights under the Fourteenth Amendment, which prohibits "takings" without just compensation. (Union Pacific, pp. 7-13) Union Pacific contends that "the Constitution simply does not allow the Commission to compel Union Pacific to continue providing water service, while denying it recovery of its costs of doing so."[8] This argument is meritless.

First, the Commission has neither arbitrarily nor unconstitutionally failed to establish appropriate water rates, as the reasons for the delay so explain below. The rate

[8] Union Pacific Rhg. App., p. 12.

case has not yet taken place; therefore, there has been no denial of recovery. The rate case will proceed when there is an adequate record upon which to base rates. Second, Union Pacific's being required to continue to operate the water system, even at a loss, is not a taking. The U. S. Supreme Court stated that "[i]t has long been settled, however, that a requirement that a particular service be rendered at a loss does not make such a service confiscatory and thereby an unconstitutional taking of property."[9] Moreover, the failure to recover capital investments is not a taking. *Duquesne Light Company v. Barasch* (1989) 488 U.S. 299. It is well established that public utilities are not guaranteed a fair rate of return:

> The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation…But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used.[10]

In a comparable case, the utility, the Mountain Water Company, used a "taking" argument in an attempt to avoid using profits accumulated from past operations, in which it claimed the public had no interest. It filed suit against its regulator in federal district court, trying to make the case for an unconstitutional taking of private property without just compensation, but was rebuffed by the district court and the U.S. Ninth Circuit Court of Appeals. Citing *Duquesne Light Co. v. Barasch*, *supra*, the U.S. Ninth Circuit stated that "all of the subsidiary aspects of valuation for rate-making purposes [cannot]…properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree."[11] The court further stated that "[o]nly if the PSC's [public service commission] rate order fails to compensate …justly for all of its private property dedicated to public use can Mountain Water complain of a

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[9] *Alabama PSC v. Southern Ry Co.* (1951) 341 U.S. 341, 352.

[10] *Pub. Service Comm'n of Montana v. Great Northern Utilities Co.* (1933) 289 U.S. 130, 135.

[11] *Mountain Water Co. v. Montana Dept of Public Service Regulation* (Ninth Cir. 1990) 919 F.2d 593, 600.

violation of its fifth amendment rights."[12] Accordingly, Union Pacific cannot successfully make the case for an unconstitutional "taking" at this time because its rate case has not been completed, and any losses incurred in the interim cannot be the basis for an unconstitutional taking of property without just compensation.

Union Pacific may be frustrated by the ratemaking process, but this is insufficient to establish the unconstitutional taking of private property for public use, as claimed by Union Pacific. Despite the efforts of all participants in this proceeding, the record, as it now stands, does not permit appropriate rates to be established for customers of the Keene Water System. As noted in the Decision, the record contains only a summary of earnings and a public meeting.[13] Issues such as rate discrimination, the rate base upon which Union Pacific seeks to earn a rate of return, and other anomalies of the Keene Water System must be explored. Therefore, the Decision ordered the Director of the Water Division by September 6, 2002 to submit a ratemaking report on the Keene Water System, including a discussion of proposed rates and rate issues raised in the Decision. (Ordering Paragraph No. 4) The delay complained of by Union Pacific is unavoidable under the circumstances. The Commission is committed to proceeding with the rate case when it has the necessary data upon which to base a rate decision.

D. Union Pacific May File an Application to Transfer the Keene Water System, But May Not Abandon It.

Union Pacific had planned to abandon the Keene Water System on May 1, 2000, but the Kern County Superior Court ordered it to continue operating and maintaining the water system until May 31, 2000. When the Commission instituted this OII, it also ordered Union Pacific to refrain from discontinuing water service or abandoning the Keene Water System pending further order of the Commission.[14] Union Pacific now urges the Commission to "either allow Union Pacific water rates

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[12] *Ibid.*

[13] See Decision, *mimeo*, pp. 20-22.

[14] OII 00-05-020, Ordering Paragraph 2.

which are adequate to pay the costs of operating the system, together with a return on investment, or permit the railroad to abandon the system." (Union Pacific Rhg. App., pp. 13-14)

The Decision found that Union Pacific failed to present sufficient testimony for the Commission to consider allowing it to abandon the water system.[15] We agree that one sentence of testimony is insufficient to form a basis for allowing Union Pacific to abandon service. At a minimum, Union Pacific must show that abandonment is just, reasonable, and in the public interest. A public utility does not have the right to arbitrarily discontinue service and the fact that service is rendered at a loss does not justify its abandonment. (*San Diego Elec. Ry.* (1922) 22 CRC 363) Therefore, until Union Pacific provides reasonable grounds for abandonment, the Commission's order not to discontinue service stands.

In conclusion, as stated in the Ordering Paragraph No. 2 of the Decision, Union Pacific may file an application to transfer the Keene Water System. However, it may not abandon the system. Thereafter, the Commission will process the application according to its established practices and procedures.

E. As a Public Utility, the Keene Water System is Required to Provide Water Service to All Existing Customers Who Pay for the Service.

Another aspect of the Decision challenged by Union Pacific is the requirement that it continue providing water service to the Stonybrook Corporation, and to Steve and Barbara Cummings. (Union Pacific, pp. 14-15) As to the Stonybrook Corporation, Union Pacific claims that by virtue of the Decision's specific findings, which it failed to specify, and the prior ruling in D.97-09-014, Stonybrook is estopped from asserting or establishing a right to service from the water system. Regarding the Cummings, there was a disputed agreement with them whereby Union Pacific would allegedly provide them with water free of charge. Union Pacific and the Cummings

[15] Decision, Finding of Fact 7.

entered into a settlement agreement in which any obligation Union Pacific had to continue supplying the Cummings with water was extinguished from May 1, 2001 onward.

Notwithstanding this history, the Decision properly concluded that Union Pacific should continue to provide water to all existing customers as of the date of the OII, so long as the water consumed is paid for. (Decision, Conclusion of Law No. 6) By virtue of having been declared a public utility subject to the jurisdiction of this Commission, the Keene Water System is bound by a different set of rules and regulations. As a public utility, the Keene Water System cannot pick and choose which members of the public it will serve. Contrary to Union Pacific's assertion, the Decision need not specify which customers should be served. Neither the agreement with Steve Cummings nor D.97-09-014 provides a basis for terminating service to Stonybrook or the Cummings. The authority to discontinue providing service to paying customers can only be had from the Commission; it cannot be conferred by consumers.[16]

F. The Decision is Supported by the Law and the Evidence.

Union Pacific claims that the text and certain findings in the Decision are not supported by the evidence. Union Pacific did not link any of the statements to the Decision's findings or conclusions of law. Moreover, the statements cited by Union Pacific are not material to the Decision, as required by PU Code §1705.[17] For example, Union Pacific asserts that there is no factual basis for the statement in the Decision that no individual party or dwelling can ascertain individual usage where there is a shared meter. (Union Pacific, p. 15) The appropriate forum in which to explore this issue is in the rate case. In any event, the truth of this statement has no bearing on the Decision's holding that the Keene Water System is a public utility. The same reasoning applies to

[16] See *Van Hoosear, supra*, p. 557.

[17] PU Code §1705 requires Commission Decisions to contain separately stated findings of fact and conclusions of law on all issues material to the order or Decision.

the two other statements cited by Union Pacific.[18] These statements, though true, are immaterial to the holding of the Decision. The law and the evidence provide ample support for the Decision.

IV. CONCLUSION

We have reviewed each and every allegation of legal error raised in the rehearing application, and are of the opinion that legal error has not been demonstrated. Therefore, we deny rehearing.

Therefore, **IT IS ORDERED** that:

1. Union Pacific's application for the rehearing of D.02-04-017 is denied.

This order is effective today.

Dated August 22, 2002 at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

[18] The second statement concerns Union Pacific's objection to the Decision's characterization on page 23 that Union Pacific does not dispute the fact that "when the railroad sold housing that included water service to non-employees, that the new owners had a reasonable expectation that water service would continue to be provided by the water purveyor, the railroad." The third statement that Union Pacific objects to is the statement on page 21 that "Union Pacific's revenues are significantly greater than any class A water utility." (Union Pacific's Rhg. App., p. 15)